

Date: September 18, 1997

Case No.: 96-INA-19

In the Matter of:

PUEBLA FOODS, INC.,
Employer

On Behalf Of:

FELIPE FLORES,
Alien

Appearance: Harlan E. Schackner, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 18, 1994, Puebla Foods, Inc. ("Employer") filed an application for labor certification to enable Felipe Flores ("Alien") to fill the position of Machine Setter (Mexican Food Products) (AF 9-10). The job duties for the position are:

Sets-up and adjusts machines for other workers according to specifications and tooling instructions, applying knowledge of machining methods. Reads blue prints and job order[s] for product specifications, dimensions and tolerances, and tooling instructions, such as feed rate, cutting speed, depth of cut, fixtures, and cutting tools to be used. Installs and adjusts holding device and fastens specified cutting and shaping tools in position to enable operator to produce finished workpiece to specifications, using handtools, such as wrenches, screwdrivers, and pliers. Selects and set[s] speed and feed of machine according to type of operation and specified material and finish. Starts machine to obtain first-run workpiece and verifies dimensional tolerance using micrometers, gauges and templates. Changes worn cutting tools and adjusts operation of machine, such as cutting speed, feed rate and depth of cut, when required. Replaces parts on machines, such as bearings, filters, wiring and switches, using handtools. Type of machinery: flour tortilla oven, cooling conveyor inclines, flour tortillas hydraulic press dough mixers, corn tortillas machines, corn chips machines, corn tortilla counter stacker and other similar machinery.

The only requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on March 31, 1995 (AF 46-50), proposing to deny certification on the grounds that the Employer is in violation of the regulations at § 656.21(b)(5) that state that an employer is required to document that his requirements for the job opportunity are the minimum necessary for the performance of the job and that it has not hired, nor is it feasible to hire workers with less training and/or experience. The CO noted that the Alien did not have any experience in this occupation prior to his employment with the Employer, but was hired as a trainee. The CO requested the Employer to fully document why it is not feasible to train a U.S. worker now, or to submit evidence which clearly shows that the Alien had the required two years of experience at the time of his hire, or to reduce the requirements to those which the Alien had at the time of his hire and indicate a willingness to train.

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Next, the CO proposed denial of labor certification as the Employer is in violation of the regulations at § 656.21(b)(2), which requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the U.S. and as defined for the job in the *Dictionary of Occupational Titles* (D.O.T.). Additionally, the CO referred to the regulations at § 656.24(b)(2)(ii), which state that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner the duties involved in the occupation as customarily performed by other workers similarly employed. Also, the CO stated that § 656.21(b)(6) (recodified as § 656.21(b)(5)) provides that U.S. applicants may be rejected solely for lawful, job-related reasons, and § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. The CO determined that the Employer's rejection of U.S. applicant Johanne Y. Barrios may have been for reasons that are not lawful and job related.

Accordingly, the Employer was notified that it had until May 5, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 1, 1995 (AF 51-62), the Employer contended that the Employer has no one available to train someone for this job opportunity. Additionally, the Employer contended that the requirements for the position are those normally required for this job. The Employer stated that:

A person who has no experience in working with Mexican Food production machinery could not possibly set our line machinery in a safe and efficient manner. Improperly set line machinery, it should be pointed out, will create tremendous hazards for line workers and will result in frequent production stoppages for purposes of machine repair/maintenance. It could also result in improper preparation or contamination of our food products thereby creating tremendous risks of harm for the unsuspecting consuming public.

The Employer further contended that every Machine Setter it has ever hired was required to have a minimum of two years of experience in all of the duties shown on the ETA 750A form, and these are the duties which are normally required for the offered position.

The Employer listed the business necessity reasons for each duty described on the ETA 750A form. The Employer then stated that an applicant must have experience with the machinery listed on the ETA 750A form, because someone without this experience would not be able to set the line machinery in a safe and efficient manner. Regarding U.S. applicant Barrios, the Employer stated that he lacked the requisite experience setting up and adjusting some of the machinery used by the Employer. Also, the Employer stated that applicant Barrios wasn't even qualified to perform "generalized" machine setting as "[w]hatever machine setting activities he may have performed in his respective jobs were merely incidental to his primary operational and quality control responsibilities in those positions." Next, the Employer stated that the experience requirement of working with the machinery which is specific to the Mexican food production process was indicated on the ETA 750A form, the advertisement, and the posting for this job opportunity. The Employer then indicated a willingness to readvertise the position.

The CO issued the Final Determination on May 26, 1995 (AF 63-65), denying certification because “[t]here is no evidence presented that a worker with Mr. Barrios’ background and minor orientation (not training) could not perform the duties of the job in the normally accepted manner; Mr. Barrios’ application indicates extensive experience in machine setting. Accordingly, the CO determined that the Employer’s rejection of U.S. applicant Barrios was without merit, and labor certification was denied.

On June 8, 1995, the Employer requested reconsideration of the denial of labor certification (AF 66-76). The CO denied reconsideration on July 5, 1995 (AF 77). On July 25, 1995, the Employer requested review of the denial of labor certification (AF 78-83), and on October 3, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) (now recodified as § 656.21(b)(5)) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are “able, willing, qualified and available” to perform the work as required by § 656.1.

The issue in the instant case is whether the Employer rejected a U.S. applicant, Mr. Barrios, for lawful, job-related reasons. On the ETA 750 form, the Employer listed the duties for the job opportunity as:

Sets-up and adjusts machines for other workers according to specifications and tooling instructions, applying knowledge of machining methods. Reads blue prints and job order[s] for product specifications, dimensions and tolerances, and tooling instructions, such as feed rate, cutting speed, depth of cut, fixtures, and cutting tools to be used. Installs and adjusts holding device and fastens specified cutting and shaping tools in position to enable operator to produce finished workpiece to specifications, using handtools, such as wrenches, screwdrivers, and pliers. Selects and set[s] speed and feed of machine according to type of operation and specified material and finish. Starts machine to obtain first-run workpiece and verifies dimensional tolerance using micrometers, gauges and templates. Changes worn cutting tools and adjusts operation of machine, such as cutting speed, feed rate and depth of cut, when required. Replaces parts on machines, such as bearings, filters, wiring and switches, using handtools. Type of machinery: flour tortilla oven, cooling conveyor inclines, flour tortillas hydraulic press dough mixers, corn

tortillas machines, corn chips machines, corn tortilla counter stacker and other similar machinery.

(AF 10). Further, the Employer requires two years of experience in the job offered.

Mr. Barrios has approximately 15 years of experience as a Machine Setter, Machine Operator, and Machine Assembler (AF 31). Specifically, Mr. Barrios indicated on a questionnaire that he has experience setting up and operating a variety of machine tools (AF 30). He further acknowledged that he can fit and assemble parts to repair and maintain machines, applying knowledge of mechanics, shop mathematics, metal properties, layout, and machine procedures. Moreover, the applicant stated on the questionnaire that he has experience observing and listening to operating machines and equipment so as to diagnose malfunctions and determine the need for adjustment and repair. Additionally, Mr. Barrios stated that he has experience studying schematics and machine parts to determine the type of repairs needed. Finally, the applicant indicated that he has experience assembling and starting machines to verify correction or malfunction, as well as maintaining and lubricating machine tools and welding broken structural parts.

After interviewing Mr. Barrios, the Employer stated that:

The applicant indicated that he has no experience whatsoever with any of the machines that he would be setting-up and adjusting in our company; the Flour Tortilla Oven, Cooling Conveyor Incline, Flour Tortillas Hydraulic Press, Dough Mixer, Corn Tortillas Machine, Corn Chips Machine and Corn Tortilla Counter Stacker. This applicant also has very limited experience as a Machine Setter in other industries. In fact, as you will note, he listed on his application for employment that in each position he also was a machine operator, quality control man, assembler, food selector, etc. Upon interviewing the applicant, it was discovered that only a very small part of his job duties in each position involved machine setting. He is clearly unqualified for this position.

(AF 33). Likewise, in rebuttal the Employer stated that the applicant lacks the requisite experience setting-up and adjusting specific Mexican food machinery (AF 58). In addition, the Employer stated that a review of the applicant's credentials shows that he isn't even qualified to perform generalized machine setting activities. Finally, the Employer noted that the applicant's machine setting experience was merely incidental to his primary operational and quality control responsibilities in those positions.

In summary, the Employer appears to have rejected the applicant because he lacks experience with specific Mexican food machines. In addition, the Employer has also argued that the applicant does not even possess experience in the general machine-setting duties. We agree that Mr. Barrios does not have experience with the specific Mexican food machines listed by the Employer; however, we find that his resume, as well as his answers to the inquiries on the questionnaire, indicate that he would be able to perform the core machine-setting duties. Furthermore, we find that it would not require a prohibitive amount of training to familiarize the applicant with the specific Mexican food machinery. Previous cases have held that applicants who

do not meet the employer's exact requirements or do not have exact experience in the job duties were qualified for the job where their resumes indicated that they could do the job with a reasonable period of on-the-job-training. See *Anderson-Mraz Design*, 90-INA-142 (May 30, 1991); *Taam Shabbos*, 90-INA-87 (May 20, 1991); *Culver City Nissan*, 90-INA-47 (Oct. 23, 1990).

We further find that the Employer's argument that the applicant does not have experience in general machine-setting duties is unsubstantiated. We note that the Employer is only requiring two years of experience in the job offered (AF 10). Mr. Barrios' resume indicates that he has 15 years of experience as a Machine Setter, Machine Operator, and Machine Assembler (AF 31). Moreover, the applicant's responses to the questionnaire indicate that he has experience with general machine-setting duties (AF 31). Therefore, the Employer's conclusory statements that Mr. Barrios does not have the requisite experience in general machine-setting duties are insufficient to establish that the applicant is unqualified for the job opportunity.

We find that the Employer has not established that there are not U.S. workers who are "able, willing, qualified and available" to perform the work. Accordingly, the CO's denial of labor certification is hereby **AFFIRMED**.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.